IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. OP 17-0322

ROBERT D. BASSETT,

Plaintiff-Appellant,

v.

PAUL LAMANTIA; CITY OF BILLINGS,

Defendants-Appellees.

ANSWER BRIEF OF DEFENDANT/APPELLEE PAUL LAMANTIA

On Certified Question from the United States Court of Appeals for the Ninth Circuit, Cause No. DV 15-35045

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1. Officer Paul Lamantia (Lamantia) agrees that Bassett correctly recited the certified question as presented by the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

Lamantia agrees with Bassett's description of the procedural history of his lawsuit. However, he notes that the Ninth Circuit failed to even mention, let alone rule upon, Lamantia's opposition to Bassett's motion to certify a question to the Montana Supreme Court. Bassett did not raise the issue of certification when he opposed the summary judgment motion of Lamantia in federal district court. Only after he lost on summary judgment did the issue of certification arise. Not only was the certification motion untimely, Bassett failed to show compelling circumstances that generally must be presented to support certification at such a late date.

STATEMENT OF FACTS

Lamantia agrees that Bassett accurately recorded the "Background" as recited by the Ninth Circuit, *Bassett v. Lamantia, et al.*, 858 F.3d 1201, 1203 (9th Cir. 2017). However, Lamantia contends that the "Background" was incomplete and thereby provided inadequate factual bases for serious consideration of the certified question. The inadequacy of the Background skews the legitimacy of the certified question. As framed by the Ninth Circuit, the "key" factual basis of the

certified question focuses on whether "the officer is the direct and sole cause of the harm suffered by the Plaintiff?" *Id.* at 1201. However, when the complete factual background of the interactions between Bassett and Lamantia is considered, in context, it cannot be reasonably alleged that Lamantia was the "direct and sole cause" of Bassett's alleged "harm." At a minimum, the full, unedited, contextual Background reveals at least a question of comparative fault thereby negating the certified question as presently formulated.

Until filing his lawsuit, Bassett repeatedly stated that his encounter with Lamantia was simply a case of "mistaken identity." Until filing his lawsuit, Bassett repeatedly told a story of his substantial involvement in the events leading up to Lamantia taking him to the ground. Until filing his lawsuit, Bassett told a story that confirmed his fault in the events leading to his encounter with Lamantia. Only after filing a lawsuit did his story suddenly change. For purposes of completeness and context, the fully documented Statement of the Case as presented to the Ninth Circuit is included in the Supplemental Appendix (SAPPX001-008).bh f

STANDARD OF REVIEW

Lamantia disputes Bassett's identification of the applicable standard of review. Bassett incorrectly quotes this court in *State Farm Fire & Cas. Co. v. Bush Hog, LLC,* 2009 MT 349, ¶ 4, 353 Mont. 173, 176, 219 P.3d 1249, 1252.

Bassett Brief at 4. Although this court stated in *Bush Hog* that its review is "purely an interpretation of the law," it did not, as Bassett states, apply the law "to the set of facts presented by the certifying court." *Id.* at 4. Instead, as confirmed by this court, "the law [is] applied to the **agreed facts** underlying the action." *Bush Hog* at ¶ 4, 353 Mont. at 176 (emphasis added). The correct citation to *Bush Hog* is critical because, as documented above, Lamantia does not agree with the limited Background presented by the Ninth Circuit. He contends that the "agreed facts" this court should consider in resolving the certified question are set out in the attached Supplemental Appendix.

SUMMARY OF ARGUMENTS

The Public Duty Doctrine protects law enforcement officers and other emergency responders from claims of negligence because given their unique status as public servants, their duty is to protect and preserve the peace for the general public, as opposed to individuals. The public policy justification for the Public Duty Doctrine, in the context of law enforcement services, applies irrespective of whether the conduct of a law enforcement officer results in alleged harm directly to an individual or from a third party. The protections of the Public Duty Doctrine are narrowly tailored to recognize the unique role of public service law enforcement officers provide. They are confronted with, and expected to resolve, situations foreign to the general public. They are often called upon to make split

second decisions and judgments which impact the safety and welfare of individuals and the general public. When "mistakes" are made, as Bassett repeatedly stated, a case of "mistaken identity," the Public Duty Doctrine should apply unless a special relationship existed between the law enforcement officer and the person alleging harm.

The scope of the Public Duty Doctrine is already narrowly applied. When a "special relationship" is established, it does not apply. What Bassett and *Amicus* Montana Trial Lawyers Association (MTLA) propose is a new, previously unrecognized exception to the doctrine. In reality, what they are requesting is an exception that swallows the rule and effectively negates its public policy justifications for law enforcement and other emergency service providers whose conduct benefits the general public. The public policy supporting the Public Duty Doctrine for law enforcement services has been recognized by this court since 1999. These policy considerations are as valid today as they were 18 years ago. This court should refuse to carve out yet another exception to the Public Duty Doctrine which effectively negates its intended purpose in the context of law enforcement and other emergency public services.

The certified question is specific and narrow in scope. As framed by the Ninth Circuit, it does not apply to the factual background of Bassett's encounter with Lamantia. At a minimum, Bassett was comparatively at fault during his

encounter with Lamantia. Because comparative fault is at issue, Lamantia could not be the "sole cause of the harm suffered by the Plaintiff." Consequently, this court should deny the certified question as applied to the actual facts of the encounter between Bassett and Lamantia.

This court should reject the invitation of MTLA to entertain a broad, general attack on the Public Duty Doctrine, including its constitutionality. The certified question does not reach the issues argued by MTLA. The sole issue presented by the certified question is whether an unrecognized exception to the doctrine will be created by this court to destroy its viability in serving the public interests for all Montana residents.

ARGUMENT

A. This Court Should Not Expand the Certified Question Beyond the Limited Scope Presented by the Ninth Circuit.

The certified question as formulated by the Ninth Circuit has a very limited and discrete scope. It applies solely to the factual circumstance where the "agreed facts" confirm that a law enforcement officer was the "direct and sole cause of the harm suffered by the plaintiff." Despite the very narrow parameters of the certified question, MTLA, and to a lesser extent Bassett, seek to expand the certified question to encompass a full-scale attack on the Public Duty Doctrine, including challenging its Constitutionality. This attempted expansion of the certified question should not be adopted by this court. Rather, based on the

"agreed facts," Lamantia maintains that the certified question does not apply to his conduct because he was not the "direct and sole cause of the harm suffered by [Bassett]."

Because there is indisputably an issue of comparative fault in the encounter between Lamantia and Bassett, the certified question, as framed by the Ninth Circuit, does not apply. A finding of fault, i.e., negligence, on the part of Bassett negates the premise of the certified question, i.e., that the alleged negligent conduct of the law enforcement officer was the "direct and sole cause of the harm" claimed by a plaintiff. If negligence is shared, so too is causation.

Additionally, the wrongful conduct of the unknown, fleeing suspect was certainly a "cause" of Bassett's harm. "But for" the conduct of the unknown, fleeing suspect, Lamantia would not have been pursuing him and Bassett would not have placed himself in a position of potential harm. Or, the fleeing suspect was a "cause" of Bassett's injury because his conduct "in a natural and continuous sequence ….helped produce [Bassett's injury] and the injury would not have occurred without it." *Busta v. Columbus Hospital*, 276 Mont. 342, 363, 372, 916 P.2d 122, 135, 140 (1996). Obviously, the conduct of Lamantia was not the "sole cause" of Bassett's injury. There were multiple causes that come into play. Of course, this emphasizes why the focus of the Public Duty Doctrine should not be

on causation but on the element of "duty," as this court has repeatedly emphasized.

Bassett interjected himself into Lamantia's pursuit of a fleeing suspect. He wanted to "help out" the pursuing police officer. But by choosing this negligent course of conduct, he was injured. *See SAPPX* at 4-5. There were multiple "causes" of Bassett's harm, including his negligence. And, because Lamantia was instinctively reacting in self-defense, he was not negligent in the first place, the first prerequisite of the certified question. Based on the limited scope of the certified question, it does not apply to the conduct of Lamantia.

B. The Public Duty Doctrine Applies to All Legitimate Conduct of Law Enforcement Officers Performed in the Course and Scope of Their Official Duties.

Although this court has refined its interpretation and application of the Public Duty Doctrine, it has made clear that it was, and continues to be, a complete defense available to law enforcement officers against claims of negligence when they are performing their official duties. The protections of the Public Duty Doctrine were first formally enunciated by this court in *Nelson v. Driscoll*, 1999 MT 193, 295 Mont. 363, 983 P.2d 972. "Generally, a police officer has no duty to protect a particular individual absent a special relationship. . . . (citations omitted) This rule is derived from the public duty doctrine. . . ." *Id.*, ¶ 21. "[I]n the context of claims against law enforcement officers, the Public Duty

Doctrine expresses the policy that an officer's overreaching duty to protect and preserve the peace is owed to the public at large, not to individual members of the public. *Nelson v. State*, 2008 MT 336 ¶ 41, 346 Mont. 206, 195 P.3d 293.

This court limited the scope of the Public Duty Doctrine in *Gatlin-Johnson v. Miles City*, 2012 MT 302, 367 Mont. 414, 291 P.3d 1129. But, it reaffirmed the applicability of the doctrine in the context of law enforcement activities. "The Public Duty Doctrine was not intended to apply in every case to the exclusion of any other duty a public entity may have. It applies only if the public entity truly has a duty owed only to the public at large, *such as a duty to provide law enforcement services*. . . ." *Id.* at ¶ 17 (emphasis added).

The most recent pronouncements by this court regarding the Public Duty Doctrine are found in *Kent v. City of Columbia Falls*, 2015 MT 139, 379 Mont. 190, 350 P.3d 7. The issue presented in *Kent* was whether the district court properly applied the Public Duty Doctrine to grant summary judgment to the City. The claim in *Kent* arose out of a skateboarding accident on a portion of a paved path in a residential development.

Plaintiffs alleged, *inter alia*, that the City was negligent in approving the design of the path. They claimed the City failed to follow its own regulations and ordinances regarding the development and construction of the path. After extensive discovery, the City moved for summary judgment arguing that any

negligence claim against it was barred by the Public Duty Doctrine. The district court agreed. On appeal, this court reversed summary judgment in favor of the City disagreeing with the application of the Public Duty Doctrine. *Id.* at ¶¶ 1-3, 10-11, 13, 17-18, 52-53.

Importantly, in deciding *Kent*, this court reaffirmed the viability of the Public Duty Doctrine and its applicability when a plaintiff's injury arises out of an alleged breach of duty by a governmental official "owed to the general public rather than to the individual plaintiff." *Id.* at ¶ 23, *citing Gatlin-Johnson*, ¶ 14. It reaffirmed that "[s]uch duties to the general public include law enforcement services. . . . '[A] law enforcement officer has no duty to protect a particular person absent a special relationship because the officer's duty to protect and preserve the peace is owed to the public at large and not to individual members of the public.'" *Id.* at ¶ 23, *citing Gonzalez v. City of Bozeman*, 2009 MT 277 ¶ 20, 352 Mont. 145, 217 P.3d 487.

In *Kent*, this court reaffirmed that an "exception" to the Public Duty Doctrine exists, even in the context of law enforcement activities, "when a 'special relationship' arises, 'giving rise to [a] special duty that is more particular than the duty owed to the public at large.'" *Id.* at ¶ 23, *citing Nelson v. Driscoll*, 1999 MT 193 ¶ 22, 295 Mont. 363, 983 P.2d 972. This court then discussed the four

circumstances when a "special relationship generally can be established." *Id.* at ¶ 24.

Referencing the definition of "claim" as used in Montana's Tort Claims Act, this court noted that governmental liability can arise "from an act or omission 'under circumstances where the governmental entity, if a private person, would be liable to the claimant for damages under the laws of the state.'" *Id.* at ¶ 38. This court stressed that its ruling in "*Gatlin-Johnson* [was] not 'new' law; rather, it is a reminder that courts should first determine whether a governmental defendant has a specific duty to a plaintiff arising from 'generally applicable principles of law' that would support a tort claim. If a private person would be liable to the plaintiff for the acts that were committed by the government, then the government entity should similarly be liable." *Id.* at ¶ 39. This court recognized that "[m]any of the City's actions were similar to those that would be typically undertaken by architects, contractors, and engineers. Consequently, this case does not involve a uniquely governmental activity." *Id.* at ¶ 44.

In the present case, there is no question that the conduct of Lamantia was "a uniquely governmental activity" because it occurred solely in the context of providing law enforcement services. A "private person" would not have found himself in the same position as Lamantia. Private persons do not provide law enforcement services.

The only reason Lamantia interacted with Bassett in the early morning hours of July 16, 2012, was because he was a police officer dispatched to the area of Bassett's home in response to a suspicious person call. He found himself in Bassett's yard because he was pursuing an unknown suspect who refused to follow his lawful orders to stop. The physical contact between Lamantia and Bassett occurred, according to Bassett, solely because of a case of "mistaken identity" as Lamantia pursued the fleeing suspect.

Private persons do not have a "duty" to respond to calls for law enforcement services from the public and to involve themselves in a pursuit of an unknown, noncompliant suspect. Lamantia was engaged in a "uniquely governmental activity" when the alleged injury to Bassett happened.

Justice Cotter, in her concurring opinion in *Kent*, left no doubt that the Public Duty Doctrine found its historic roots in the public policy of protecting law enforcement activities from civil liability citing to the "precepts set forth in *South v. Maryland*, 59 U.S. 396, 15 L.Ed. 433 (1856). The Supreme Court there concluded that the duty of a sheriff to keep the peace was a public duty which would be punishable only by indictment. *Kent* at ¶ 59. Citing to this court's decision of *Phillips v. Billings*, 233 Mont. 249, 758 P.2d 772 (1988), Justice Cotter emphasized that "we concluded that the general duty of a police officer to protect the public 'does not give rise to liability for a particular individual's injury absent

a greater duty imposed by a special relationship.'" *Id.* at ¶ 58. She acknowledged the "special relationship" exception was first recognized in the context of law enforcement officers in *Nelson v. Driscoll*, 1999 MT 193, *id.* at ¶ 59. She stated, "[t]hus when we adopted the 'Public Duty Doctrine' we did so in the limited context of its application to law enforcement officers." *Id.* at ¶ 60.

Justice Cotter then expressed her view that this court had "gone wrong" "in expanding the sweep of the Public Duty Doctrine to encompass all matters of general government conduct. * * * As the argument and citations contained in Justice Baker's dissent underscore, the Public Duty Doctrine has morphed from a doctrine born and intended to apply only to the actions and decisions of law enforcement, into one that is applied to a broad swath of governmental actions and omissions." *Id.* at ¶¶ 61-62.

The analytical framework applied to the Public Duty Doctrine, as repeatedly stressed over the past 18 years by this court, holds that the Public Duty Doctrine applies to law enforcement services. Absent a "special relationship" established through one or more of the four circumstances recognized by this court, an individual cannot pursue a negligence claim against a law enforcement officer performing law enforcement activities, acting in the course and scope of his or her employment.

C. Montana Courts Have Never Limited the Public Duty Doctrine to Injuries to Third Parties.

The certified question, and the positions advocated by Bassett and MTLA, presuppose a fiction about the Public Duty Doctrine, i.e., that it should not be applied equally to individuals directly harmed versus harm from third parties. However, this distinction has never been adopted or even recognized by this court. The "general rule" establishing its application to law enforcement activities was clearly identified in *Nelson v. Driscoll, supra*: "[A] police officer has no duty to protect a particular individual absent a special relationship. . . ." *Nelson*, 1999 MT 193, ¶ 21, 295 Mont. 363. This court did not and has not restricted the Public Duty Doctrine to third parties. The proper focus in analyzing the applicability of the Public Duty Doctrine, in the context of law enforcement activities, is to assume it applies unless there was a "special relationship" between the law enforcement officer and the injured party – not whether an individual was directly harmed or harmed by a third party.

The "policy" served by the Public Duty Doctrine is the "overreaching duty to protect and preserve the peace owed to the public at large, not to individual members of the public." *Nelson v. State*, 2008 MT 336, ¶ 41, 346 Mont. 206. The Public Duty Doctrine protects law enforcement officers from negligence claims when they are acting in the public interest by providing law enforcement services.

In *Peschel v. City of Missoula*, 664 F.Supp.2d 1149 (D.Mont. 2009), plaintiff sued, *inter alia*, three Missoula police officers for alleged unlawful arrest, excessive force, and failure to provide necessary medical care. Claims of negligence were asserted. Identical to Bassett, the plaintiff in *Peschel* alleged the police officers were solely responsible for his injuries. No third party or independent source was involved. Nonetheless, the federal district court recognized the applicability of the Public Duty Doctrine. *Id.* at 1166-67. However, the court ruled that because "Peschel's custody status satisfies the fourth special relationship exception," the Public Duty Doctrine was not a bar to his negligence claims. *Id.* at 1167.

The federal district court decision in *Estate of Peterson v. Missoula*, 664 F.Supp.2d 1149 (D.Mont. 2009), is consistent with prior decisions of the Montana federal court, with the exception of the original federal district court decision in *Ratcliff v. City of Red Lodge*, 2014 WL 526695 (D.Mont.). In *Estate of Peterson, supra*, the federal district court granted summary judgment to the defendants, including Detective Krueger, on all negligence claims. Peterson alleged that Detective Krueger pressured the decedent to act as a confidential informant which ultimately led to decedent's suicide. Although the negligence allegations were based solely on Detective Krueger's direct, personal, contacts with the decedent, the district court granted summary judgment to Detective Krueger based on the

Public Duty Doctrine. It determined that none of the four exceptions to the doctrine established a special relationship between Detective Krueger and the decedent. Consequently, no "duty" existed between the two that could support a negligence claim. 2014 WL 3868217 at 14.

In *Wagemann v. Robinson, et al.*, 2015 WL 3899226 (D.Mont.), the federal district court dismissed negligence claims against the defendant law enforcement officers relying upon the Public Duty Doctrine. The plaintiff in *Wagemann* asserted various claims against four law enforcement officers relating to his arrest for an aggravated assault charge, the issuance of a trespass citation, and other alleged wrongful conduct. The allegations of negligence were based on specific conduct between the officers and plaintiff, as opposed to plaintiff's interactions with third parties or sources other than the officers. Nonetheless, the district court had no trouble applying the Public Duty Doctrine to preclude plaintiff's negligence claims. "[T]here was no special relationship with the police officers. The Public Duty Doctrine applies, the officers owed him no duty beyond what they owe to the public at large. Thus, the police officers are entitled to summary judgment on Wagemann's negligence claims." 2015 WL 3899226 at 22.

The protection afforded to law enforcement officers by the Public Duty Doctrine is not unlimited. If a "special relationship" exists between the law enforcement officer and the alleged injured party, common law negligence

principles apply. Introducing a new and unrecognized exception to the Public Duty Doctrine, as advocated by Bassett and MTLA, will effectively negate the public policy considerations expressed by this court since its formal recognition of the doctrine 18 years ago in *Nelson v. Driscoll, supra*.

D. Bassett's Reliance Upon Out-of-State, Intermediate Appellate Court Decisions to Support His Novel Argument That a New Exception Should Be Recognized to the Public Duty Doctrine Should Be Rejected.

The cases cited by Bassett are inapposite to this court's interpretation and application of the Public Duty Doctrine in the context of law enforcement services. For example, in the Maryland intermediate decision of *Jones v. State*, 425 Md. 1, 38 A.3d 333 (2012), Bassett failed to acknowledge the dispositive differences in the reasoning of that case versus the present situation. In *Jones*, the court discussed the "policy considerations that undergird Maryland's Public Duty Doctrine." *Citing to Ashburn v. Anne Arundel County*, 306 Md. 617, 510 A.2d 1078 (1986), and *Muthukumarana v. Montgomery County*, 370 Md. 447, 806 A.2d 372 (2002), the appellate court noted that the facts in *Jones* did not present a situation where law enforcement officers were "called upon to react quickly and with 'reasoned discretion,' and therefore are not susceptible to post hoc review by lay juries." *Id.* at 26, 38 A.3d at 347.

In the present case, there is no dispute that Lamantia acted in an instinctive manner, in self-defense, when he perceived an immediate threat to his safety. He

was called upon "to react quickly and with 'reasoned discretion.'" Relying upon the rationale of *Jones*, his conduct was "therefore . . . not susceptible to post hoc review by lay juries."

The court in *Ashburn, supra,* discussed the issue of "duty" in the context of the Public Duty Doctrine. Noting that absent "a special relationship," no duty exists between police and a victim, the court stated "the 'duty' owed by the police by virtue of their positions as officers is the duty to protect the public. . . ." *Id.* at 628, 510 A.2d at 1084. Like in Montana, the *Ashburn* court recognized that "[a] proper plaintiff is not without recourse. If he alleges sufficient facts to show that the defendant policeman created a 'special relationship' with him, upon which he relied, he may maintain his action in negligence." *Id.* at 631, 510 A.2d at 1085. Ultimately, the court concluded that "[b]ecause there was no special relationship created by [the officer's] acts or by statute, [the officer] owed no duty in tort to appellant." *Id.* at 635, 510 A.2d at 1087.

This ruling in *Ashburn* is consistent with the Public Duty Doctrine as it is interpreted and applied in Montana. *See, also, Muthukumarana, supra* (absent a 'special relationship,' Public Duty Doctrine protects 911 operators from negligence claims); *McNack v. State*, 398 Md. 378, 920 A.2d 1097 (2007) (refusing to expand the scope of governmental liability, including law enforcement, because to do so would be inconsistent "with the public policy

reasons that have led us to apply the *Ashburn* test for special relationships. . . ." *Id.* at 403.).

E. Bassett's Limited Citations to Montana Case Law Are Irrelevant to the Certified Question.

This court's decision in *Barr v. Great Falls Int'l Airport Auth.*, 2005 MT 36, 326 Mont. 93, 107 P.3d 471, has nothing to do with the Public Duty Doctrine. At best, it simply recites the necessary elements of a negligence claim. In *Barr*, this court questioned plaintiff's ability to prove two of the four necessary elements of negligence, i.e., duty and causation. *Id.* at ¶¶ 40-42. Ultimately, this court ruled that no duty existed. Because the Public Duty Doctrine applies here, similarly, Bassett cannot establish duty.

Likewise, citations by the Ninth Circuit, 858 F.3d at 1204, *Bassett,* and to *Ratcliff v. City of Red Lodge*, 2014 WL 526695 (D.Mont.), are misplaced. Although noting that the decision in *Ratcliff* was reversed by the Ninth Circuit "on other grounds," 650 Fed. Appx. 484 (9th Cir. 2016), Bassett failed to note that the federal district court's decision relating to negligence was recently reversed and that reversal affirmed by the Ninth Circuit.

The federal district court originally denied summary judgment to Officer Stuber on a §1983 allegation and a state negligence claim. *Ratcliff*, 2014 WL 526695. The district court rejected a qualified immunity defense relating to the

§1983 claim and a Public Duty Doctrine defense asserted against the state law negligence claim. *Id.* at 6.

On interlocutory appeal, the Ninth Circuit reversed the district court concluding that Officer Stuber was entitled to qualified immunity. 650 Fed. App. 484.

Following remand from the Ninth Circuit, defendants sought review of the original denials of summary judgment on the state negligence claims. On renewed motions for summary judgment, they were granted to defendants on all remaining state Constitutional, negligence, and intentional tort claims. *Ratcliff*, 2016 WL 6135651. The federal district court found it unnecessary to address the Public Duty Doctrine argument in granting summary judgment on the negligence claims. Ratcliff then appealed the district court's ruling on the state claims to the Ninth Circuit. ___ Fed. Appx. ___, 2017 WL 3381908 (D.Mont.).

Importantly, Ratcliff did not challenge the district court's dismissal of his negligence claims or the application of the Public Duty Doctrine. Rather, he challenged the district court's exercise of supplemental jurisdiction over the state law claims. His appeal was soundly rejected by the Ninth Circuit. *Id.* at 2. Consequently, the numerous iterations of *Ratcliff* provide no support for the arguments advanced by either Bassett or MTLA.

The original decision in *Ratcliff, supra*, was an anomaly. Not only was it inconsistent with established Montana law, it was inconsistent with the federal district court's prior rulings in *Peschel v. City of Missoula*, 664 F.Supp.2d 1149 (D.Mont. 2009), and *Todd v. Baker*, 2012 WL 199529. Additionally, it was inconsistent with two subsequent decisions issued by the Montana federal district court, i.e., *Estate of Peterson v. City of Missoula*, 2013 WL 108735 (D.Mont.), and *Wagemann v. Robinson, et al.*, 2015 WL 3899226 (D.Mont.).

As originally decided, *Ratcliff* was contrary to Judge Molloy's prior ruling in *Todd v. Baker*, 2012 WL 199529. In *Todd*, the plaintiff sued a number of parties, including officers from the Kalispell Police Department, relating to, *inter alia*, his tasing in September of 2007 as he allegedly ran from two of the officers. Todd claimed, *inter alia*, the "negligent use of excessive force" based on the taser deployment. *Id.* at 12. Defendant police officers relied upon the Public Duty Doctrine as a defense to this negligence claim, arguing they had no duty to plaintiff. *Id.*

Judge Molloy resolved the negligence issue in *Todd* relying on the Public Duty Doctrine and the four circumstances under which a special relationship could arise. *Id.* He concluded that "[t]he officers' duty was general, not to Todd specifically. * * * Here, the firing of the taser is the only basis for Todd's negligence allegations, based on the arguments and facts presented here, it

occurred before the officers owed him a duty as his custodians." *Id.* He cited *Deboer v. City of Olympia*, 183 Fed. App. 671, 672 (9th Cir. 2006), for the proposition that under Washington law the Public Duty Doctrine barred a negligence claim based on an allegation of excessive force. He also relied upon *James v. City of Seattle*, 2011 WL 6150567 (W.D. Wash. 2011), for the same proposition. He noted that in *James* there were "other cases and [the] holding [that] the Public Duty Doctrine precluded liability where police officers tasered a man who was driving and lost control of his vehicle." *Id.* Relying on the cited legal precedents and reasoning, Judge Molloy concluded "[a]ccordingly, based on the record in this case, defendants are entitled to summary judgment on Todd's negligence claims." *Id.*

F. The Legal Precedents Relied Upon By MTLA Are Irrelevant, Misinterpreted, Misapplied, and Provide No Justifiable Reason for Refusing to Protect Law Enforcement Officers From Negligence Claims Absent Establishment of a Special Relationship.

The decision in *Scott v. Henrich*, 1998 MT 118, 288 Mont. 489, 958 P.2d 709, predates this court's first recognition of the Public Duty Doctrine in *Nelson v. Driscoll*, *supra*. The sole issue presented to this court in *Scott* was whether the district court erred "in granting summary judgment in favor of the Respondent [police officers] on the grounds that the officers acted reasonably as a matter of law?" *Id.* at ¶ 11. Whether the Public Duty Doctrine applied or was a defense was not raised, briefed, or decided in this appeal. This court reversed summary

judgment in favor of the law enforcement officers relying on opinions from plaintiff's expert and circumstantial evidence which raised factual disputes precluding summary judgment "on the grounds that the officers acted reasonably as a matter of law." *Id.* at ¶ 22. This court did not recognize the Public Duty Doctrine as a viable defense to a law enforcement officer until 15 months after its decision in *Scott* when the doctrine was first enunciated in favor of law enforcement officers in *Nelson v. Driscoll, supra.*

The holding in *Liser v. Smith*, 254 F.Supp.2d 89 (D.D.C. 2003), was based on a single foreign federal district court interpreting and applying the Public Duty Doctrine under the law of the District of Columbia. In one paragraph of analysis, the court determined the Public Duty Doctrine did not apply because "where there is no allegation of a failure to protect," and "where the government itself is solely responsible" for the claimed injury, the doctrine will not provide a defense. *Id.* at 93, 102.

MTLA's suggestion that the decision in *Liser* supports the proposition that the Public Duty Doctrine should not apply to the conduct of Lamantia is not only contrary to Montana law, it is a gross overstatement of the holding. The holding in *Liser* is undeniably at odds with Montana's interpretation and application of the Public Duty Doctrine. The District of Columbia apparently views the doctrine as strictly "deal[ing] with the question [of] whether public officials have a duty to

protect individual members of the general public against harm from third parties or other independent sources." *Id.* at 102. It has consistently followed this view, although other courts within the same jurisdiction have not seen fit to adopt this restrictive and limiting interpretation and application of the Public Duty Doctrine. *See, e.g., Gates v. United States*, 928 F.Supp.2d 63 (D.D.C. 2013).

G. Contrary to the Rhetoric of MTLA, the "Trend" Is the Recognition, Adoption, and Application of the Public Duty Doctrine to Provide Emergency Responders, Including Law Enforcement Officers, With a Complete Defense to Claims of Negligence.

In reality, contrary to the assertions of MTLA, "the footsteps of many jurisdictions" is to "join stride with the trend in the United States," MTLA Brief at 11, to recognize and apply the Public Duty Doctrine as a defense to negligence claims, particularly to emergency responders, including law enforcement officers. *Ezell v. Cockrell*, 902 S.W.2d 394, 400-01 (Tenn. 1995); *McCuiston v. Butler*, 509 S.W.3d 76, 82 (Ky. Ct. App. 2017); *Oliver v. Cook*, 377 P.3d 265, 269-70 (Wash. Ct. App. 2016); *Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009); *City of Toccoa v. Pittman*, 648 S.E.2d 733 (Ga. Ct. App. 2007); *Benton v. City of Oakland City*, 721 N.E.2d 224 (Ind. 1999); *Estate of McFarlin v. State*, 881 N.W.2d 51 (Iowa 2016); *Skiles v. Cty. of Rawlins*, 468 F.Supp.2d 1311 (D. Kan. 2007), *on reconsideration in part*, No. 06-4040-JAR, 2007 WL 983123 (D. Kan. Mar. 22, 2007) (applying Kansas law); *Wheeler v. Lynn*, 2011 WL 2182540 (W.D. Mo.) (applying Missouri law); *Radke v. Cty. of Freeborn*, 694 N.W.2d 788 (Minn.

2005); *Banker v. Cty. of Livingston*, 782 F.Supp.2d 39 (W.D.N.Y. 2011) (applying New York law); *Casteel v. Tinkey*, 151 A.3d 261 (Pa. Commw. Ct. 2016); *Toegemann v. City of Providence*, 21 A.3d 384 (R.I. 2011); *Estate of Burgess ex rel. Burgess v. Hamrick*, 698 S.E.2d 697 (N.C. Ct. App. 2010); *Fickling v. City of Charleston*, 643 S.E.2d 110 (S.C. Ct. App. 2007); *Gordon v. Bridgeport Hous. Auth.*, 544 A.2d 1185 (Conn. 1988); *Ruf v. Honolulu Police Dep't*, 972 P.2d 1081, 1088 (Haw. 1999) ("The failure of the police to provide protection is ordinarily not actionable."); *Cooper v. Rodriguez*, 118 A.3d 829 (Md. 2015); *Southers v. City of Farmington*, 263 S.W.3d 603, 622 (Mo. 2008), *as modified on denial of reh'g* (Sept. 30, 2008); *E.P. v. Riley*, 604 N.W.2d 7 (S.D. 1999); *Holsten v. Massey*, 490 S.E.2d 864 (W. Va. 1997); *Beaudrie v. Henderson*, 631 N.W.2d 308, 316 (Mich. 2001); Annot., *Modern Status of Rule Excusing Governmental Unit From Tort Liability on Theory That Only General, Not Particular, Duty Was Owed Under Circumstances*, 38 A.L.R. 4th 1194, 1197 (1985 & Supp. 2011).

Many of the cases cited by MTLA reveal that a number of jurisdictions continue to recognize the Public Duty Doctrine or have implemented statutory protections for government actors, including law enforcement officers and first responders, thereby replacing the protections of the Public Duty Doctrine. For example, MTLA claims that the Public Duty Doctrine has been discarded in Florida in light of the state's abrogation of sovereign immunity, citing *Commercial*

Carrier Corp. v. Indian River Co., 371 So.2d 1010 (Fla. 1979). Yet, the Florida Supreme Court continues to recognize the validity of the Public Duty Doctrine explaining that it is a distinct issue from sovereign immunity. *Wallace v. Dean*, 3 So. 3d 1035, 1045 (2009).

A federal court applying Florida law reached the same conclusion: "with respect to the public duty exception to the statutory waiver of sovereign immunity, a plaintiff must demonstrate that the government entity owed a duty of care to the plaintiff individually rather than to the public in general." *Lippman v. City of Miami*, 724 F.Supp.2d 1240, 1259 (S.D. Fla. 2010).

MTLA's citation to *Fowler v. Roberts*, 556 So. 2d 1 (La. 1989), is misplaced. Louisiana codified a statute that achieves the same purpose as the Public Duty Doctrine and determines liability based on a duty-risk analysis. *Hardy v. Bowie*, 744 So. 2d 606, 612-13 (La. 1999). For many states, the enactment of statutory immunities replaced and negated the need for the Public Duty Doctrine. *See, e.g., Estate of Graves v. Circleville*, 922 N.E.2d 201, ¶ 20 (Ohio 2010).

H. The Constitutionality of the Public Duty Doctrine Is Not at Issue.

The certified question does not raise the issue of the constitutionality of the Public Duty Doctrine. Bassett did not and has not challenged the constitutionality of the doctrine. Only MTLA raised the issue of the constitutionality of the

doctrine. This court should reject the invitation of MTLA to address an issue completely separate from the certified question. However, it should be noted that despite the vigorous and spirited dissents of retired Justice James Nelson, the Public Duty Doctrine has withstood constitutional scrutiny. *See, Gonzales v. City of Bozeman*, 2009 MT 277, ¶¶ 54-87.

CONCLUSION

The Public Duty Doctrine plays an important role in protecting law enforcement officers and other emergency responders from claims of negligence when they are performing official duties in the course and scope of their employment. It applies unless a special relationship exists between the law enforcement officer and the plaintiff. A special relationship is established through four recognized circumstances. Creating a new exception to include when a law enforcement officer is the direct and sole cause of the harm suffered by the plaintiff interjects more complexity and confusion to the application of the doctrine and further weakens, and ultimately destroys, its public policy purpose. The focus of the doctrine should be on a law enforcement officer's duty to provide law enforcement services that benefit the public, irrespective of whether the conduct ultimately results in harm to an individual directly or a third party. This court should respond to the Ninth Circuit telling it the Public Duty Doctrine does

apply even if the officer is "the direct and sole cause of the harm suffered by the plaintiff."

RESPECTFULLY SUBMITTED this 23rd day of August, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 6,192 words**,** not averaging more than 280 words per page, excluding the Certificate of Service and Certificate of Compliance.

DATED this 23rd day of August, 2017.

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